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FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 76

[MB Docket No. 14-261; FCC 14-210]

Promoting Innovation and Competition in the Provision of Multichannel Video Programming Distribution Services

AGENCY: Federal Communications Commission

ACTION: Proposed rule.

SUMMARY: In this document, the Commission propose new rules designed to better reflect the fact that video services are being provided increasingly over the Internet. Specifically, we propose to modernize our interpretation of the term “multichannel video programming distributor” (“MVPD”) by including within its scope services that make available for purchase, by subscribers or customers, multiple linear streams of video programming, regardless of the technology used to distribute the programming. Such an approach will ensure both that incumbent providers will continue to be subject to the pro-competitive, consumer-focused regulations that apply to MVPDs as they transition their services to the Internet and that nascent, Internet-based video programming services will have access to the tools they need to compete with established providers.

DATES: Comments are due on or before **[INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER]**, and reply comments are due on or before **[INSERT DATE 45 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER]**.

ADDRESSES: You may submit comments, identified by MB Docket No. 14-261, by any of the following methods:

- Federal Communications Commission's Web Site: <http://fjallfoss.fcc.gov/ecfs2/>. Follow the instructions for submitting comments.
- People with Disabilities: Contact the FCC to request reasonable accommodations (accessible format documents, sign language interpreters, CART, etc.) by e-mail: FCC504@fcc.gov or phone: 202-418-0530 or TTY: 202-418-0432.

For detailed instructions for submitting comments and additional information on the rulemaking process, see the SUPPLEMENTARY INFORMATION section of this document.

FOR FURTHER INFORMATION CONTACT: For additional information on this proceeding, contact Brendan Murray, Brendan.Murray@fcc.gov, of the Media Bureau, Policy Division, (202) 418-1573 or Mary Margaret Jackson, MaryMargaret.Jackson@fcc.gov of the Media Bureau, (202) 418-1083.

For additional information concerning the information collection requirements contained in this document, send an email to PRA@fcc.gov or contact Cathy Williams on (202) 418-2918.

SUPPLEMENTARY INFORMATION: This is a summary of the Commission's Notice of Proposed Rulemaking, FCC 14-210, adopted on December 17, 2014 and released on December 19, 2014. The full text of this document is available for public inspection and copying during regular business hours in the FCC Reference Center, Federal Communications Commission, 445 12th Street, SW., CY-A257, Washington, DC, 20554. This document will also be available via ECFS (<http://www.fcc.gov/cgb/ecfs/>). (Documents will be available electronically in ASCII, Word 97, and/or Adobe Acrobat.) The complete text may be purchased from the Commission's copy contractor, 445 12th Street, SW., Room CY-B402, Washington, DC 20554. To request these documents in accessible formats (computer diskettes, large print, audio recording, and Braille), send an e-mail to fcc504@fcc.gov or call the Commission's Consumer and Governmental Affairs Bureau at (202) 418-0530 (voice), (202) 418-0432 (TTY).

Executive Summary

In the Notice of Proposed Rulemaking (“NPRM”), we propose to update our rules to better reflect the fact that video services are being provided increasingly over the Internet. Specifically, we propose to modernize our interpretation of the term MVPD by including within its scope services that make available for purchase, by subscribers or customers, multiple linear streams of video programming, regardless of the technology used to distribute the programming. Such an approach will ensure both that incumbent providers will continue to be subject to the pro-competitive, consumer-focused regulations that apply to MVPDs as they transition their services to the Internet and that nascent, Internet-based video programming services will have access to the tools they need to compete with established providers. For readability throughout the NPRM, we use the term “Internet-delivered” to refer to any service delivered using IP whether or not it uses the public Internet, except for cable service.

Here the Commission faces, as it has before, the impact of technology transition. Incumbent cable systems have made plain their intent to use a new transmission standard that will permit cable systems to deliver video via IP, and other innovative companies are also experimenting with new business models based on Internet distribution. That is not surprising: Over-the-air television has moved from analog transmission to digital. The telephone networks of the 20th Century have become broadband networks, providing a critical pathway to the Internet. And, in our January Technology Transitions Order, the Commission encouraged experiments that assess the impact on consumers of the coming transition from traditional copper facilities to new telecommunications networks composed of fiber, copper, coaxial cable, and/or wireless connections.

The Commission has recognized that innovation must be encouraged, but not at the expense of technology-neutral public policies. That is why the January Technology Transitions Order emphasized the importance of preserving competition, consumer protection, and public

safety. And that is why the NPRM proposes to ensure that the rights and responsibilities of an MVPD are not jeopardized by changes in technology. This IP transition will enable cable operators to untether their video offerings from their current infrastructure, and could encourage them to migrate their traditional services to Internet delivery. With these changes on the horizon, it becomes important to interpret the statutory definition of MVPD to ensure that our rules apply sensibly and in a way that encourages innovation regardless of how service is delivered and that the pro-consumer values embodied in MVPD regulation will continue to be served. In so doing, we take note of the regulatory requirements that cable operators must adhere to as they use new technology to offer services, and we invite comment on the regulatory treatment of additional services that cable operators may offer.

Adoption of a technology-neutral MVPD definition will not only preserve current responsibilities, it may create new competitive opportunities that will benefit consumers. Increasingly, companies – incumbents and new entrants alike – are interested in using the Internet as the transmission path for packages of video channels. In initiating this proceeding, our goal is to bring our rules into synch with the realities of the current marketplace and consumer preference where video is no longer tied to a certain transmission technology.

Specifying the circumstances under which an Internet-based provider may qualify as an MVPD, possessing the rights as well as responsibilities that attend that status, may incent new entry that will increase competition in video markets. In particular, extending program access protections to Internet-based providers would allow them to “access[] critical programming needed to attract and retain subscribers.” And extending retransmission consent protections and obligations to those providers would allow them to enter the market “for the disposition of the rights to retransmit broadcast signals.” Broadcast and cable-affiliated programming could make Internet-based services attractive to customers, who would access the services via broadband.

The resulting increased demand for broadband may in turn provide a boost to the deployment of high-speed broadband networks.

In the NPRM, we seek comment on possible interpretations of the term MVPD as used in the Communications Act of 1934, as amended (the “Act”) and seek comment on how each of those interpretations would affect the industry and consumers. Below, we seek comment on two possible interpretations: We propose to interpret the term MVPD to mean distributors of multiple linear video programming streams, including Internet-based services and tentatively conclude that this interpretation is a reasonable interpretation of the Act, and is most consistent with consumer expectations and conditions in the industry. We also seek comment on an alternative interpretation that would require a programming distributor to have control over a transmission path to qualify as an MVPD and invite comment on whether this interpretation is consistent with the Act and Congressional intent. We also invite comment on how this interpretation would apply as companies begin to offer subscription linear video services over the Internet.

We then seek comment on the effects that either interpretation would have on entities that are classified as MVPDs, consumers, and content owners. We seek comment on how each interpretation would benefit and burden entities that would be subject to our rules. We also ask whether we should consider exemption or waiver of certain regulations, if allowed under the statute. We seek comment on whether to modify our retransmission consent “good faith” negotiation rules with respect to Internet-based MVPDs to protect local broadcasters. We seek comment on what impact these interpretations would have on content owners, including broadcasters and cable-affiliated programmers. Finally, we seek comment on how to ensure that our interpretation will promote competition and broadband adoption, consistent with the Act and Commission policy.

We also note that the fact that an entity uses IP to deliver cable service does not alter the classification of its facility as a cable system and does not alter the classification of the entity as a

cable operator. In other words, those video programming services provided over the operator's facilities remain subject to regulation as cable services. We seek comment on the regulatory status of purely Internet-based linear video programming services that cable operators and direct broadcast satellite ("DBS") providers may choose to offer in addition to their traditional services.

I. BACKGROUND

Section 602(13) of the Act defines an MVPD as "[A] person such as, but not limited to, a cable operator, a multichannel multipoint distribution service, a direct broadcast satellite service, or a television receive-only satellite program distributor, who makes available for purchase, by subscribers or customers, multiple channels of video programming." The Act also defines the terms "channel" and "video programming," which are used in the MVPD definition. Section 602(4) defines "channel" as "a portion of the electromagnetic frequency spectrum which is used in a cable system and which is capable of delivering a television channel (as television channel is defined by the Commission by regulation)." And Section 602(2) of the Act defines "video programming" as "programming provided by, or generally considered comparable to programming provided by, a television broadcast station."

On March 24, 2010, Sky Angel U.S., LLC ("Sky Angel"), a provider of multiple streams of prescheduled programming over the Internet, filed a complaint and petition for temporary standstill for program access relief, which is available only to MVPDs. On April 21, 2010, the Commission's Media Bureau denied the petition for standstill, holding that Sky Angel failed to carry its burden of demonstrating that it is likely to succeed in showing on the merits that it is an MVPD entitled to seek relief under the program access rules. The Media Bureau determined that the term "channel" as used in the definition of MVPD appears to include a transmission path as a necessary element. Based on the limited record at the time, the Bureau was unable to find that Sky Angel provides its subscribers with a transmission path. Sky Angel's complaint, a second petition for injunctive relief, a motion for sanctions, and discovery requests are pending. In

2012, Sky Angel filed a Petition for Writ of Mandamus with the United States Court of Appeals for the D.C. Circuit, asking the court to require the Commission to adopt and release a final order on the merits of its complaint, and the court denied the Petition “without prejudice to renewal in the event of significant delay.” In March 2012, the Media Bureau issued a Public Notice in connection with the Sky Angel complaint, seeking comment on the most appropriate interpretation of the definition of an MVPD (the “March 2012 Public Notice”) to ensure that the Commission has the benefit of broad public input. In June 2014, Sky Angel notified the Commission that it had “suspended its video and audio distribution services” in January 2014 because it is unable “to acquire programming in a fair and nondiscriminatory way.”

More recently, issues have arisen regarding the status of Aereo, Inc., a former provider of online linear video programming, under the Copyright Act and Communications Act. On June 25, 2014, the Supreme Court found that Aereo violated certain copyright holders’ exclusive right to perform their works publicly as provided under the Copyright Act. Aereo then filed with the Copyright Office to pay statutory royalties to retransmit broadcast signals as a cable system. The Copyright Office accepted the filing “on a provisional basis,” pending “further regulatory or judicial developments,” including this Commission’s interpretation of the term MVPD and the outcome of the case that was pending before the U.S. District Court for the Southern District of New York. On November 21, 2014, Aereo filed to reorganize under Chapter 11 of the U.S. Bankruptcy Code.

Comments filed in response to the March 2012 Public Notice reveal a wide range of views. By initiating this rulemaking proceeding, we propose an interpretation that we based on many comments in the record of that proceeding. But we continue to seek broad public input, including discussions with stakeholders, which will fully inform us as we seek to clarify the scope of the definition of MVPD. We note that the Media Bureau recently changed the *ex parte* status of the March 2012 Public Notice. And today, the Bureau issued a decision holding the

Sky Angel proceeding in abeyance pending the outcome of this proceeding and terminating the March 2012 Public Notice docket. These actions will allow parties to discuss with the Commission the definitional and policy issues raised herein without running afoul of the ex parte rules.

II. DISCUSSION

As discussed below, we tentatively conclude that the statutory definition of MVPD includes certain Internet-based distributors of video programming. Specifically, we propose to interpret the term MVPD to mean all entities that make available for purchase, by subscribers or customers, multiple streams of video programming distributed at a prescheduled time. In reaching this conclusion, we understand that the market for Internet-based distribution of video programming is nascent and that companies continue to experiment with business models. The current business models include, but are not limited to, the following types of Internet-based video service offerings, including combinations of these offerings: Subscription Linear. We use this term to refer to Internet-based distributors that make available continuous, linear streams of video programming on a subscription basis. This category includes Sky Angel's service as it existed before 2014 and Aereo's service as it existed before the Supreme Court decision. Subscription On-Demand. We use this term to refer to Internet-based distributors that make video programming available to view on-demand on a subscription basis, allowing subscribers to select and watch television programs, movies, and/or other video content whenever they request to view the content without having to pay an additional fee beyond their recurring subscription fee. This category includes Amazon Prime Instant Video, Hulu Plus, and Netflix. Transactional On-Demand. We use this term to refer to Internet-based distributors that make video programming available to view on-demand, with consumers charged on a per-episode, per-season, or per-movie basis to rent the content for a specific period of time or to download the content for storage on a hard drive for viewing at any time. This category includes Amazon

Instant Video, CinemaNow (Best Buy), Google Play, iTunes Store (Apple), Sony Entertainment Network, Vudu (Walmart), and Xbox Video (Microsoft). Ad-based Linear and On-Demand.

We use this term to refer to Internet-based distributors that make video programming available to view linearly or on demand, with consumers able to select and watch television programs, movies, and/or other video content whenever they request on a free, ad-supported basis. This category includes Crackle, FilmOn, Hulu, Yahoo! Screen, and YouTube as they exist today.

Transactional Linear. We use this term to refer to non-continuous linear programming that is offered on a transactional basis. This category includes Ultimate Fighting Championship's UFC.TV pay-per-view service. We invite commenters to identify other categories and examples of Internet-based distributors of video programming not mentioned here.

As explained below, we seek comment on our tentative conclusion that entities that provide Subscription Linear video services are MVPDs as that term is defined in the Act because they make multiple channels of video programming available for purchase. We seek comment also on whether any of the other categories of Internet-based distributors of video programming identified above fall within the statutory definition of an MVPD. Because these other Internet-based distributors of video programming either (1) make programming available for free, and not "for purchase" as required by the definition of an MVPD, or (2) do not provide prescheduled programming that is comparable to programming provided by a television broadcast channel, we believe they fall outside the statutory definition. We seek comment on this view.

Below, we begin by seeking comment on our proposed interpretation of the definition of the term MVPD and on alternative interpretations. We then seek comment on the public policy ramifications of these alternatives and any other alternatives commenters may suggest. We note that an entity that uses IP to deliver cable service does not alter the classification of its facility as a cable system and does not alter the classification of the entity as a cable operator. Finally, we

seek comment on how to treat Internet-based linear video programming services that cable operators and DBS providers may choose to offer in addition to their traditional services.

Defining MVPD. To qualify as an MVPD under the Communications Act, an entity must “make[] available for purchase, by subscribers or customers, multiple channels of video programming.” The Commission has previously held that video distributed over the Internet qualifies as “video programming.” Thus, the key remaining definitional issue is how to interpret the phrase “multiple channels of video programming.” We seek comment on this issue as set forth below.

The Act defines a “channel” as “a portion of the electromagnetic frequency spectrum which is used in a cable system and which is capable of delivering a television channel (as television channel is defined by the Commission by regulation).” As discussed in the Media Bureau’s March 2012 Public Notice and in further detail below, there are at least two possible interpretations of the term “channel” within the definition of MVPD. We tentatively conclude that the best reading is that “channels of video programming” means streams of linear video programming (the “Linear Programming Interpretation”). Under this interpretation, linear video programming networks, such as ESPN, The Weather Channel, and other sources of video programming that are commonly referred to as television or cable “channels,” would be considered “channels” for purposes of the MVPD definition, regardless of whether the provider also makes available physical transmission paths. We also seek comment on an alternative interpretation under which the definition of MVPD would include only entities that make available transmission paths in addition to content, and thus exclude those Internet-based distributors of video programming that do not own or operate facilities for delivering content to consumers (the “Transmission Path Interpretation”). We seek comment on which interpretation is most consistent with the text, purpose, legislative history, and structure of the Act and which interpretation best serves Congressional intent. We also invite commenters to identify any other

interpretation of MVPD that is consistent with the statute and would better serve Congressional intent. For example, some commenters call for a “functional equivalency” standard, whereby an entity would qualify as an MVPD if it looks and functions like a traditional MVPD from the perspective of consumers; others suggest that Internet-based distributors should be allowed to elect whether or not to avail themselves of MVPD status, taking on both the benefits of such status (such as program access) as well as the regulatory obligations. To the extent that any commenters favor these or other interpretations, they should explain how their proposed interpretation comports with the statute, how it would be administered or adjudicated in particular cases, and describe the policy ramifications.

Proposed “Linear Programming Interpretation”. Under our proposed rule, we would interpret the term “channels of video programming” to mean prescheduled streams of video programming (which we refer to in this NPRM as “linear” programming), without regard to whether the same entity is also providing the transmission path. We believe that this is the better interpretation for three reasons: (i) it is a reasonable interpretation of the Act and most consistent with Congressional intent, (ii) it best aligns with consumer expectations and industry developments, and (iii) it is consistent with the common meaning of the word channel. We seek comment on the interpretation as set forth below. We seek comment also on our proposal to define “linear video” as a “stream of video programming that is prescheduled by the programmer.”

We tentatively conclude that our proposed Linear Programming Interpretation is consistent with the language of the statute. The statutory definition of MVPD begins by stating that an MVPD is a “person such as, but not limited to, a cable operator, a multichannel multipoint distribution service, a direct broadcast satellite service, or a television receive-only satellite program distributor” In the Sky Angel Standstill Denial, the Media Bureau stated that, although the list is preceded by the phrase “not limited to,” making it clear that the list is illustrative rather than exclusive, it is also preceded by the phrase “such as,” which suggests that

other covered entities should be “similar” to those listed. We tentatively conclude that the essential element that binds the illustrative entities listed in the provision is that each makes multiple streams of prescheduled video programming available for purchase, rather than that the entity controls the physical distribution network. Therefore, we believe that our interpretation is consistent with the illustrative list of MVPDs that the statutory definition provides.

In addition, the Commission has previously held that an entity need not own or operate the facilities that it uses to distribute video programming to subscribers in order to qualify as an MVPD. Rather, an MVPD may use a third party’s distribution facilities in order to make video programming available to subscribers. We find, therefore, that our proposed interpretation is consistent with Commission precedent. We seek comment on this finding.

We also find the term “channel” used in the context of the MVPD definition (*i.e.*, “multiple channels of video programming”) to be ambiguous. Further, we tentatively conclude that Congress did not intend the term “channel” in this context to be interpreted in accordance with the definition in Section 602(4) of the Act, but rather intended the term to be given its ordinary and common meaning. The Act states that “the term ‘cable channel’ or ‘channel’ means a portion of the electromagnetic frequency spectrum which is used in a cable system and which is capable of delivering a television channel (as television channel is defined by the Commission by regulation). This definition was adopted in the 1984 Cable Act, which focused primarily on the regulation of cable television. In contrast, the term “MVPD” was adopted by Congress eight years later in 1992, when new competitors to cable were emerging, and is specifically “not limited” solely to cable operators. Therefore, we tentatively conclude that we should not rely on the cable-specific definition of the term “channel” to interpret the definition of “MVPD,” which is explicitly defined to encompass video programming distributors that include, but are not limited to, cable operators.

Moreover, using the cable-specific definition of “channel” to interpret the definition of “MVPD” does not seem consistent with the illustrative list of MVPDs that is included in the definition. For example, DBS providers are specifically included in the definition as MVPDs, but the linear streams of video programming that they provide to subscribers do not align with the definition of “channel” in Section 602(4) of the Act, because that definition specifically refers to the electromagnetic spectrum “used in a cable system.” If Congress intended an entity to have control over the transmission path in order to be deemed an MVPD, presumably it would have explicitly specified that in the definition of MVPD, as it did with the definition of cable system. Therefore, we tentatively conclude that, when Congress defined an MVPD as an entity that “makes available . . . channels of video programming,” it did not intend to limit the types of entities that meet the definition to only those that control the physical method of delivery (*i.e.*, a transmission path). As a consequence, we believe that this is a reasonable interpretation of the Act. We seek comment on this position.

We believe that our proposed interpretation is consistent with Congress’s intent to define “MVPD” in a broad and technology-neutral way to ensure that it would not only cover video providers using technologies that existed in 1992, but rather be sufficiently flexible to cover providers using new technologies such as Internet delivery. The Act imposes important pro-consumer responsibilities on MVPDs. As incumbent MVPDs transition to IP delivery, we must ensure that the definition of MVPD is read broadly enough to ensure that consumers do not lose the benefits those provisions are intended to confer. For example, we note that the goals of the program access provision of the Cable Television Consumer Protection and Competition Act of 1992 (“1992 Cable Act”) are to increase competition and diversity in the video programming market, to increase the availability of programming to persons in rural areas, and to spur the development of communications technologies. It would frustrate those goals to exclude from coverage new technologies and services that develop. Consumers are watching more online

subscription video, and incumbent operators and new entrants alike are experimenting with or planning to launch linear video services over the Internet. Therefore, we tentatively conclude that the Linear Programming Interpretation is most consistent with consumer expectations and industry trends, and we believe that Congress's goals are best served by an interpretation of MVPD that accommodates changing technology. We seek comment on our tentative conclusion that our proposed interpretation is most consistent with consumer expectations and industry trends. To the extent that commenters disagree with our interpretation, they should address why an interpretation of MVPD that focuses on the physical delivery method an entity uses to provide video programming (i) would serve Congress's goals, (ii) would promote innovation, and (iii) is consistent with the statute.

Finally, certain commenters suggest that the term "channel" can be interpreted both in the "content" sense and in the "container" sense: "In a video context, the Act uses the term both in a 'container' sense, to refer to a range of frequencies used to transmit programming, and in a 'content' sense to refer to the programming itself, or the programmer." Those commenters argue that, based on the context, the content sense applies when interpreting the definition of MVPD, "since only that reading is consistent with the Act's pro-competitive purposes." We note that the legislative history of the 1992 Cable Act refers to ESPN as a "sports channel" and CNN as a "news channel"; given that both of these are linear programming networks, this suggests that Congress used the term channel, at least in this instance, to refer to such programming networks and not to portions of the electromagnetic frequency spectrum. Commenters provide numerous examples of the use of the term "channel" in both the content sense (*i.e.*, a linear video programming network) and the container sense (*i.e.*, a range of frequencies used to transmit programming) in everyday usage and in dictionaries, as well as by Congress and the Commission. Because the term "channel" as used in the definition of MVPD is ambiguous, we tentatively conclude that it is reasonable to read the term to have its common, everyday meaning

of a stream of prescheduled video programming when we interpret the definition of MVPD. As discussed above, we believe our proposed interpretation is most consistent with the Act's goals of increased video competition and broadband deployment. In addition, we believe that it is most consistent with consumer expectations because consumers are focused on the content they receive, rather than the specific method used to deliver it to them. We seek comment on this tentative conclusion.

Scope of the Linear Programming Interpretation. We also seek comment on whether, under the Linear Programming Interpretation, we can and should carve out certain types of entities that make available multiple linear streams of video programming from the MVPD definition. If we interpret "multiple channels of video programming" to mean multiple linear streams of video programming, could we, consistent with the statute, narrow the category of entities that would qualify as MVPDs? For example, are there niche online subscription programming providers or other small entities that would not be able to remain in business if they qualify as MVPDs? A "multichannel" video programming distributor is required by definition to make multiple channels of video programming available. We seek comment on how to interpret the term "multiple" in the definition of MVPD. Although we believe it is important to modernize our interpretation of MVPD to capture entities that provide service similar to or competitive with more traditional MVPD service but through new distribution methods, we also wish to ensure that our rules do not impede innovation by imposing regulations on business models that may be better left to develop unfettered by the rules applicable to MVPDs. Should we interpret the term MVPD to require that a certain number of channels of video programming, such as twenty, be made available? Would twenty channels be too low or too high? Is there justification for a different number? What if an entity makes multiple channels available nationwide, but makes only one channel available for purchase to each subscriber? Should we interpret the term "channels of video programming" to require a certain

number of programming hours per day or per week or to exempt certain niche programmers? Is there justification to require eighteen hours of programming per day, seven days per week, or some other number? We tentatively conclude that an entity that makes linear services available via the Internet is an MVPD, and our regulations apply to all of the MVPD's video services. Are there other factors that we should consider? For example, should we exempt from the interpretation of linear programming discrete, intermittent events that occur at prescheduled times, such as live individual sporting events? While these events are prescheduled by the programming provider, they are presented sporadically, in contrast to most television channels that broadcast continuously throughout the day. If such events are considered linear programming, our proposed Linear Programming Interpretation would appear to apply to online subscription video packages that stream multiple sporting events, such as those offered by Major League Baseball, Major League Soccer, the National Basketball Association, and the National Hockey League. We seek comment on whether distributors of these types of services should be included within our interpretation of MVPD and, if not, on the statutory basis for excluding them and bright-line tests that we could use to evaluate whether such an exclusion would apply.

We tentatively conclude that we should interpret MVPD so that the definition would not apply to a distributor that makes available only programming that it owns—for example, sports leagues or stand-alone program services like CBS's new streaming service. A potential consequence of the Linear Programming Interpretation would be that a programmer that decides to sell two or more of its own programming networks directly to consumers online, either instead of or in addition to selling them through cable or DBS operators' programming packages, might subject itself to the benefits and burdens of MVPD status. For example, if Disney were to offer, for purchase by subscribers, a package of linear feeds of the Disney Channel, Disney XD, and Disney Junior for online streaming to customers, would that make Disney an MVPD? Would this unduly limit consumer options? Would bringing such an offering into our

MVPD regulations discourage innovation? We seek comment on our statutory authority to adopt our tentative conclusion.

Under the Act, an entity is an MVPD only if it makes multiple channels of video programming “available for purchase.” We seek comment on what it means to make video programming available for purchase, particularly as that term would apply if we were to adopt our proposed Linear Programming Interpretation. We tentatively conclude that the term means making an offer to consumers to exchange video service for money. We seek comment on this tentative conclusion. Are there other forms of consideration that a consumer could use to purchase services? If a cable or satellite company offers its subscribers access to supplemental online linear video services without a separate charge, but as part of their paid television packages, does this offering constitute making the online services “available for purchase”? Do any cable or satellite companies charge subscribers for those services indirectly? Is there any way to trace general subscription fees specifically to supplemental online linear video services? We seek comment on how our proposed interpretation could affect new business models that do not conform with the traditional monthly subscription model, and whether we should treat those business models on a case-by-case basis.

We also seek comment on how our proposed interpretation would apply to entities that are located overseas but make linear video programming networks available for purchase in the United States over the Internet. An entity could meet the definition of MVPD under our proposed definition even if it has no physical presence in the United States. We tentatively conclude that the Commission should not assert jurisdiction over these entities. If commenters disagree, they should provide the authority under which the Commission could assert jurisdiction. If we assert jurisdiction solely over entities with a physical presence in the United States, will some Internet-based distributors of video programming locate their operations overseas to avoid Commission regulation? Would the alternative interpretation discussed below,

which would consider an entity to be an MVPD only if it maintains control over a transmission path, avoid this result by requiring an MVPD to have a jurisdictional presence in the United States?

Alternative “Transmission Path Interpretation”. We seek comment also on an alternative approach that would interpret the term channel in this context as requiring a transmission path. This is the approach for which the Media Bureau expressed tentative support in denying Sky Angel’s standstill request. Citing the statutory definition of “channel” as “a portion of the electromagnetic frequency spectrum which is used in a cable system and which is capable of delivering a television channel,” the Media Bureau expressed the tentative view that the term “channel” as used in the definition of MVPD “appear[s] to include a transmission path as a necessary element.” Under this interpretation, we would not consider Internet-based linear video providers to be MVPDs unless they control at least some portion of the physical means by which the programming is delivered—for example, via a physical cable that the provider owns or via spectrum that the provider is licensed to use. We seek comment on the Transmission Path Interpretation. How would we reconcile the Transmission Path Interpretation with previous Commission decisions that held that an entity need not own or operate the facilities that it uses to distribute video programming to qualify as an MVPD? Would an entity have to make available multiple transmission paths (or, using the language in the definition of “channel,” multiple “portions of the electromagnetic frequency spectrum”) to each subscriber or customer to qualify as an MVPD? Do all traditional MVPDs make available multiple “portions of the electromagnetic frequency spectrum” to each subscriber or customer, including cable operators using switched digital video technology or an IP-based system in which no unique transmission path is associated with any video programming stream? Is there a reasonable basis to believe that Congress intended to regulate as MVPDs only those entities that make available two or more transmission paths to each subscriber or customer, but not those that make available only one

transmission path? If we adopt the Transmission Path Interpretation, how can we ensure that our regulations keep up with technology, particularly as incumbent MVPDs transition their services to Internet delivery?

We also seek comment on whether Congress intended to promote only facilities-based competition in the video distribution market, which might support the Transmission Path Interpretation. The Conference Report accompanying the 1992 Cable Act includes a statement that Congress intended to promote “facilities-based” competition. Moreover, the Commission has previously stated that “[f]acilities-based competition’ is a term used in the legislative history of the Act to emphasize that program competition can only become possible if alternative facilities to deliver programming to subscribers are first created. The focus in the 1992 Cable Act is on assuring that facilities-based competition develops.” On the other hand, the ABC/CBS/NBC Affiliates note that “there is but one reference to ‘facilities-based competition’ in the lengthy House Report. . . . Certainly, that single reference cannot support the incorporation of a ‘transmission path’ requirement into a statutory definition that does not, on its face, contain any such restriction.” Accordingly, we seek comment on whether Congress sought to increase facilities-based competition exclusively, or sought to encourage competition to incumbent cable operators more generally, regardless of how the competitive service is delivered.

Scope of the Transmission Path Interpretation. As we note above, incumbent MVPDs are obtaining rights to distribute content online at a rapid pace and appear prepared to launch online linear video services that are not tied to their facilities. We seek comment on our regulatory authority under the Transmission Path Interpretation in these cases. The Transmission Path Interpretation seems difficult to apply in certain cases because an entity’s status would change depending on how and where the subscriber receives the content. For example, consider a subscriber who views video at her home on a tablet over broadband infrastructure that the video

distributor owns, and then visits a local coffee shop and views video on that same tablet via the Internet using broadband infrastructure that the video distributor does not own. In that case, the video provider would be an MVPD at the subscriber's home, but not at the coffee shop. We believe that this would lead to regulatory uncertainty, thus providing more support for the Linear Programming Interpretation. We seek comment on this analysis.

We invite comment on any other interpretation the Commission should consider in addition to the Linear Programming Interpretation and the Transmission Path Interpretation.

Regulatory Implications of Alternative Interpretations. Below, we seek comment on the policy ramifications of the various interpretations set forth above. To the extent possible, we encourage commenters to quantify any costs and benefits and submit supporting data. In addition to the specific effects that we ask about below, we invite commenters to identify other possible effects of the Linear Programming Interpretation and the Transmission Path Interpretation and how those effects should influence our interpretation.

We realize that under our proposed Linear Programming Interpretation, several new and planned services may be considered MVPD services. On the one hand, DISH, Sony, and Verizon have each announced linear Internet-based subscription video services whose launch is imminent. These services reportedly will carry programming from some of the largest content companies in the world. On the other hand, Aereo, FilmOn, and Sky Angel launched or planned to launch Internet-based subscription video services, but they claim that regulatory uncertainty has limited their ability to develop a subscriber base, limited investment in their services, and hindered their ability to compete. In light of these contrasting examples, we seek comment on whether the privileges and obligations set forth in this section tilt in favor of or against our proposed Linear Programming Interpretation. Would the proposal (i) give innovative companies access to programming that consumers want, or (ii) unduly and unnecessarily burden companies seeking to offer innovative new services?

Application of MVPD-Specific Regulatory Privileges and Obligations to Internet-Based Distributors of Video Programming. As discussed in further detail below, our proposed interpretation would ensure that incumbent MVPDs do not evade our regulations by migrating their services to the Internet. It would also allow Internet-based distributors of video programming, including those that do not control any facilities, to take advantage of the privileges of MVPD status but would also require them to comply with the legal obligations applicable to MVPDs. Conversely, the Transmission Path Interpretation could allow many if not most Internet-based distributors of video programming to avoid regulation, including obligations that promote important public interest benefits, and would also deprive them of certain regulatory privileges. We seek comment on these policy ramifications below.

General Privileges and Obligations. An entity that meets the definition of an MVPD is subject to both privileges and legal obligations under the Communications Act and the Commission's rules. The regulatory privileges of MVPD status include the right to seek relief under the program access rules and the retransmission consent rules. Among the regulatory obligations of MVPDs are statutory and regulatory requirements relating to (i) program carriage; (ii) the competitive availability of navigation devices (including the integration ban); (iii) good faith negotiation with broadcasters for retransmission consent; (iv) Equal Employment Opportunity ("EEO"); (v) closed captioning; (vi) video description; (vii) access to emergency information; (vi) signal leakage; (vii) inside wiring; and (viii) the loudness of commercials.

To the extent that an Internet-based distributor of video programming falls within the definition of an MVPD, it will be able to take advantage of the privileges of MVPD status but will also be subject to MVPD obligations, unless the Commission waives some or all of them if authorized to do so. We seek comment on the overall costs and benefits of applying these regulatory privileges and obligations to Internet-based distributors of video programming, including incumbent operators who migrate to Internet delivery. We also seek comment on

specific privileges and obligations below. Would waiver or exemption from certain regulations be an appropriate approach for regulating Internet-based distributors? If so, what regulations should be waived or modified to exempt Internet-based distributors, and do we have authority to do so under the Act? Alternatively, does the statute permit us to allow these entities to choose whether they wish to be classified as MVPDs?

Would subjecting Internet-based distributors to MVPD regulations deter investment in new technologies and drive some current or prospective Internet-based distributors from the market? On the other hand, would subjecting Internet-based distributors to MVPD regulations provide regulatory certainty that could reassure consumers and spur investment by service providers? To what extent should we consider increasing consumer adoption of non-traditional MVPDs as a factor in regulatory treatment of entities that provide similar services but use different delivery mechanisms? If Internet-based distributors compete with traditional MVPDs, should they be subject to the same regulatory obligations as traditional MVPDs?

Specific Privileges. Below, we seek comment on the specific privileges of MVPD status and how they would apply to Internet-based distributors of video programming. Would applying the privileges of MVPD status to Internet-based distributors of video programming impose costs on third parties, such as cable-affiliated programmers and broadcasters? To what extent would the public be harmed if these privileges did not extend to Internet-based distributors of video programming?

Program Access. As required by Section 628 of the Act, the Commission's program access rules provide certain protections to MVPDs in their efforts to license cable-affiliated programming. These rules: (i) prohibit a cable operator or its affiliated, satellite-delivered programmer from engaging in "unfair methods of competition or unfair or deceptive acts or practices" that have the "purpose or effect" of "hinder[ing] significantly or prevent[ing]" an MVPD from providing programming to subscribers or consumers (the "unfair act" prohibition);

(ii) prohibit a cable operator from unduly or improperly influencing the decision of its affiliated, satellite-delivered programmer to sell, or unduly or improperly influencing the programmer's prices, terms, and conditions for the sale of, satellite-delivered programming to any unaffiliated MVPD (the "undue or improper influence" rule); and (iii) prohibit a cable-affiliated, satellite-delivered programmer from discriminating in the prices, terms, and conditions of sale or delivery of satellite-delivered programming among or between competing MVPDs (the "non-discrimination" rule). To the extent that an MVPD believes that a cable-affiliated programmer has violated these rules, it may file a complaint with the Commission.

If the program access rules were to apply, would cable-affiliated programmers be required to negotiate with and license programming to potentially large numbers of Internet-based distributors? How will this impact the value of cable-affiliated programming to traditional MVPDs, especially as compared to non-cable-affiliated programming? To the extent that licensing programming to a particular Internet-based distributor presents reasonable concerns about signal security and piracy, do the program access rules adequately address this issue by recognizing these concerns as a legitimate reason for a cable-affiliated programmer to withhold programming from an MVPD? Would extending the reach of the program access rules have a positive effect for consumers?

We also seek comment on whether and how our proposed rule and alternative interpretations would impact competition in the video distribution market (both at present and in the future), specifically with respect to the program access rules. Among other things, the program access rules are intended to prevent cable-affiliated programmers from discriminating among similarly situated MVPDs. If Internet-based distributors of video programming are deemed not to be MVPDs because they do not make available transmission paths (and therefore are ineligible for the benefits of the program access rules), would there be any regulatory or other constraint that would prevent a cable-affiliated programmer from making its affiliated

programming available for online distribution to only certain Internet-based distributors of video programming, such as those owned by its affiliated cable operator, but not to those owned by other MVPDs? In such a scenario, because the cable-affiliated programmer would not be differentiating among “MVPDs,” would different treatment be permissible under the program access rules? How would this impact competition in the video distribution market? Cablevision contends that extending the program access rules to Internet-based distributors would give them too much flexibility compared to existing MVPD competitors. Is this a concern that we should consider, and if so, why? We note that the Commission receives few program access complaints; should this affect our analysis? Or does it reflect that programmers are following our program access rules and they are working?

Retransmission Consent. Section 325(b) of the Act benefits MVPDs by requiring broadcasters to negotiate in good faith with MVPDs for retransmission consent and prohibiting broadcasters from negotiating exclusive retransmission consent agreements with any MVPD. Absent these provisions, broadcasters could potentially refuse to negotiate with and thereby withhold their signals from MVPDs that wish to carry these signals. To the extent that an MVPD believes that a broadcaster has violated these provisions, it may file a complaint with the Commission.

We seek comment on the impact that our proposed interpretation of the definition of MVPD and alternative interpretations would have on the retransmission consent process. Under our proposal, would the retransmission consent rules force broadcasters to negotiate with and license their signals to potentially large numbers of Internet-based distributors? We seek comment also on whether and how competition in the video distribution market (both at present and in the future) would be impacted if Internet-based distributors of video programming are not considered MVPDs and therefore are not able to benefit from the retransmission consent rules.

Section 325(b)(1)(A) of the Act provides that “no cable system or other multichannel video programming distributor” shall retransmit a broadcast signal without the broadcaster’s consent. But an entity wishing to retransmit a broadcast signal also must obtain authorization to publicly perform the copyrighted works within the broadcast signal. If we adopt the Linear Programming Interpretation and the Copyright Office does not afford statutory licenses to Internet-based video providers, how would we construe a broadcaster’s obligation to negotiate in good faith? What effect should the answer to that question have on our policy analysis?

Specific Obligations. Below, we seek comment on specific obligations imposed on MVPDs and how those obligations would apply to Internet-based distributors of video programming. How costly would it be for Internet-based distributors of video programming to comply with these regulations? Would the public be harmed if these obligations did not extend to Internet-based distributors of video programming and such distribution became prevalent?

The interpretation of MVPD that we ultimately adopt in this proceeding may subject certain Internet-based distributors of video programming to Commission regulation that are not currently subject to such regulation. What transition period should we allow these entities to come into compliance with each of the relevant rules?

Program Carriage. The program carriage rules prohibit MVPDs from (i) requiring a financial interest in a video programming vendor’s program service as a condition for carriage; (ii) coercing a video programming vendor to provide, or retaliating against a vendor for failing to provide, exclusive rights as a condition of carriage; or (iii) unreasonably restraining the ability of an unaffiliated video programming vendor to compete fairly by discriminating in video programming distribution on the basis of affiliation or nonaffiliation of vendors in the selection, terms, or conditions for carriage. To the extent that a programming vendor believes that an MVPD is not in compliance with these rules, it may file a complaint with the Commission.

What practical impact, if any, would these rules have on Internet-based distributors of video programming? As we note above, large, established cable operators, DBS providers, and technology companies have announced plans to launch Internet-based video programming services that would be MVPD services under the Linear Programming Interpretation. If these companies follow through with these plans, absent application of the program carriage rules there may be no regulatory constraint preventing them from demanding a financial interest or exclusive rights from programmers as a condition for carriage. Does this argue in favor of adopting an interpretation of MVPD that would cover providers of these services under the program carriage rules? Moreover, as more Internet-based distributors invest in their own programming, they may have an incentive to favor their affiliated programming over unaffiliated programming on the basis of affiliation. We seek comment on the effect that the alternative interpretations will have on negotiations with programmers and Internet-based video programming services. What are the costs and benefits of applying the program carriage obligations to Internet-based video programming services?

Retransmission Consent. As discussed above, Section 325(b)(1)(A) of the Act provides that “No cable system or other multichannel video programming distributor shall retransmit the signal of a broadcasting station, or any part thereof, except— (A) with the express authority of the originating station” Thus, to the extent that an Internet-based distributor of video programming qualifies as an MVPD, it must receive the consent of the broadcaster before retransmitting the broadcaster’s signal. Moreover, Section 325(b) of the Act imposes an obligation on MVPDs to negotiate in good faith with broadcasters in obtaining retransmission consent. If a broadcaster believes that an MVPD has violated these provisions, it may file a complaint with the Commission.

We seek comment above on how the retransmission consent rules can benefit MVPDs, as we propose to interpret that term. We now seek comment on the practical impact the obligations

of MVPDs under the retransmission consent rules would have on Internet-based distributors of video programming that qualify as MVPDs. What impact will the obligation to negotiate in good faith with broadcasters have on the resources of Internet-based distributors of video programming that qualify as MVPDs? In particular, will Internet-based distributors of video programming that operate on a nationwide basis have to engage in negotiations with thousands of broadcasters throughout the nation?

Are some Internet-based distributors of video programming likely to prefer not to carry broadcast signals? For example, to the extent that an Internet-based provider provides service nationwide it may prefer not to offer local content. In that case, would the good faith negotiation requirements allow these distributors to simply reject all carriage terms offered by a broadcaster and to refrain from making any carriage offers of their own? Or, would this conduct amount to a violation of the duty to negotiate in good faith? Would it matter whether the distributor declined to negotiate with any broadcast stations? How will the answers to these questions impact the business models of Internet-based distributors of video programming that qualify as MVPDs but would prefer not to carry broadcast signals? Is it likely or possible that Internet-based distributors will want to carry broadcast network programming, or to carry broadcast stations nationwide?

How do network affiliation agreements impact the carriage of broadcast stations on Internet-based MVPDs? Specifically, to what extent do existing network affiliation agreements limit or prohibit local network stations' ability to grant retransmission consent rights to Internet-based MVPDs? For example, do any network affiliation agreements prohibit a local network-affiliated station from permitting the retransmission of the entirety of its signal over the Internet? Do they limit the retransmission of network programming over the Internet? Would limiting or prohibiting these provisions harm localism?

Other MVPD Obligations. Closed Captioning. Section 79.1 of the Commission’s rules (the “television closed captioning rules”) requires MVPDs to provide closed captioning, defined as the “visual display of the audio portion of video programming pursuant to the technical specifications set forth in this part.” Internet video services are not subject to these requirements. Internet-based distributors of video programming, however, are subject to the Commission’s Internet protocol (“IP”) closed captioning requirements set forth in § 79.4 of the Commission’s rules (the “IP closed captioning rules”) to the extent that they make video programming available directly to end users through a distribution method that uses IP. The IP closed captioning rules are narrower than the television closed captioning rules, insofar as the IP closed-captioning rules require closed captioning of IP-delivered video programming only if the programming is published or exhibited on television with captions, whereas the television closed captioning rules require closed captioning for all new nonexempt English- and Spanish-language video programming. The Commission has explained that the “IP closed captioning rules do not apply to traditional managed video services that MVPDs provide to their MVPD customers within their service footprint, regardless of the transmission protocol used; rather, such services are already subject to § 79.1 of the Commission’s rules.” To the extent that some Internet-based distributors of video programming qualify as MVPDs, how will this impact their obligations with respect to closed captioning? Will they be subject to § 79.1 or § 79.4 of the Commission’s rules, or will the Commission need to develop another set of requirements tailored to these services? Will we need to amend our closed captioning rules if we adopt the Linear Programming Interpretation, and if so, how?

Video Description. As required by the Twenty-First Century Communications and Video Accessibility Act of 2010, the Commission’s rules require MVPD systems that serve 50,000 or more subscribers to provide 50 hours per quarter of video description, which makes video programming accessible to people who are blind or visually impaired, on each of the five most

popular nonbroadcast networks. In general, MVPDs of any size must pass through any video description provided with programming they carry, including broadcast channels, as long as they have the technical capability to do so. Section 79.105 of the Commission's rules requires apparatus designed to receive or play back video programming to decode and make available the secondary audio stream, if technically feasible, to facilitate the transmission and delivery of video description. We seek comment on the costs as well as the practical impact these obligations will have on an Internet-based distributor of video programming that qualifies as an MVPD. Are there attributes of Internet-based distributors of video programming that make compliance with these requirements more burdensome than for traditional MVPDs? We also seek comment on our authority to extend our video description regulations to Internet-delivered MVPDs under the Linear Programming Interpretation. Will we need to amend our video description rules if we adopt the Linear Programming Interpretation, and if so, how?

Accessibility of Emergency Information. Section 79.2 of the Commission's rules requires MVPDs to comply with certain requirements pertaining to the accessibility of emergency information by persons with disabilities. And to make emergency information accessible to individuals who are blind or visually impaired, § 79.105 of the Commission's rules requires apparatus designed to receive or play back video programming to decode and make available the secondary audio stream, if technically feasible. We seek comment on the costs as well as the practical impact these obligations will have on Internet-based distributors of video programming that qualify as MVPDs. Will we need to amend our emergency information accessibility rules if we adopt the Linear Programming Interpretation, and if so, how?

Accessible User Interfaces, Guides, and Menus. Section 79.108 of the Commission's rules requires MVPDs to "ensure that the on-screen text menus and guides provided by navigation devices for the display or selection of multichannel video programming are audibly accessible in real time upon request by individuals who are blind or visually impaired." We seek

comment on the costs and the practical impact these obligations will have on Internet-based distributors of video programming that qualify as MVPDs, particularly in light of the fact that digital apparatus (aside from navigation devices) that are designed to receive digital video (including IP video) must be accessible to and useable by individuals who are blind or visually impaired. Will we need to amend our user interface accessibility rules if we adopt the Linear Programming Interpretation, and if so, how?

Equal Employment Opportunities (“EEO”). The Commission’s EEO rules apply to MVPDs. In general terms, these rules (i) require MVPDs to provide equal opportunity in employment to all qualified persons and prohibit MVPDs from discriminating in employment based on race, color, religion, national origin, age, or sex; (ii) require MVPDs to engage in certain outreach and recruitment activities; and (iii) require MVPDs to comply with certain reporting and recordkeeping requirements. We seek comment on the practical impact these obligations will have on Internet-based distributors of video programming that qualify as MVPDs. Do Internet-based distributors of video programming currently meet some or all of these requirements? Will we need to amend our EEO rules if we adopt the Linear Programming Interpretation, and if so, how?

Navigation Devices. Section 629 of the Act directs the Commission to adopt regulations to assure the commercial availability of navigation devices used by consumers to access services from MVPDs. The Commission has adopted several regulations that allow consumers to attach non-harmful devices to MVPD networks, require MVPDs to offer separate conditional access elements if they use navigation devices to perform conditional access functions, and prohibit MVPDs from using integrated conditional access in the devices that they lease or sell to their consumers. We seek comment on the practical impact as well as the costs these obligations will have on Internet-based distributors of video programming that qualify as MVPDs. To what extent do Internet-based distributors of video programming use navigation devices in the

provision of their video programming service? If they do use such devices, do they currently meet these requirements? What devices do they use to provide programming to subscribers? Sky Angel, for example, states that its service cannot be viewed without its “proprietary set-top box, which Sky Angel directly and remotely controls at all times for purposes ranging from periodic service and software updates to service activation or termination.” Do Internet-based distributors meet the requirements for an exemption from the integration ban? Are there aspects of Internet-based video services that make compliance with these requirements more burdensome than for traditional MVPDs? Will we need to amend our navigation device rules if we adopt the Linear Programming Interpretation, and if so, how?

Signal Leakage. The Commission’s rules require specified MVPDs to comply with certain technical rules pertaining to signal leakage, as well as reporting and notification requirements related thereto. We expect that in general MVPDs that use Internet protocol to deliver video will not use aeronautical frequencies and thus will not be subject to these requirements. We seek comment on this expectation, and any practical impact these obligations will have on Internet-based distributors of video programming that qualify as MVPDs. Will we need to amend our signal leakage rules if we adopt the Linear Programming Interpretation, and if so, how?

Inside Wiring. The Commission’s cable inside wiring rules apply to all MVPDs. In general terms, these rules govern the disposition of home wiring and home run wiring after a subscriber terminates service. To what extent, if any, would these obligations affect Internet-based distributors of video programming that qualify as MVPDs, especially if they do not control the “last mile” of the transmission path used to deliver video programming to consumers but are affiliated with an entity that controls the transmission path? We expect that if we adopt the Linear Programming Interpretation that these inside wiring rules would not apply to Internet-based distributors of video programming.

Commercial Loudness. As required by the CALM Act, the Commission's rules require MVPDs to ensure that commercials are transmitted to consumers at an appropriate loudness level in accordance with a specified industry standard. Depending on the size of the MVPD and the type of the commercial at issue (*i.e.*, inserted by the MVPD or embedded in the programming by a third-party), the Commission's rules may require an MVPD to install equipment and associated software or perform spot checks or both. Do these requirements need to be modified to apply to Internet-based distributors of video programming that qualify as MVPDs, and if so, how? If the requirements do need to be modified, are there ways to make the rules less burdensome for Internet-based distributors of video programming while meeting our statutory mandates?

MDU Access. The Commission's rules prohibit cable operators, common carriers (or their affiliates) that provide video programming, and OVS operators from enforcing or executing any provision in a contract that grants to it the exclusive right to provide any video programming service to a Multiple Dwelling Unit. The Commission has sought comment on whether to extend this prohibition to other MVPDs. To the extent the Commission were to do so, what impact, if any, would this prohibition have on Internet-based distributors of video programming that qualify as MVPDs? Is there any way a landlord could restrict a tenant's ability to access certain content over the Internet to prevent a tenant from accessing an Internet-based linear video service? Will we need to amend our MDU access rules if we adopt the Linear Programming Interpretation, and if so, how?

Other Regulatory Issues. We also seek comment on how other regulations should account for Internet-based distributors of video programming that qualify as MVPDs. For example, should we extend any cable or satellite-specific regulations to MVPDs more generally? If so, what would be our statutory basis for doing so?

Impact on Content Owners. As discussed in this section, our interpretation of the definition of an MVPD may impact content owners in their negotiations with broadcasters, cable networks, and MVPDs. We seek comment on these issues below.

Broadcast Content. Section 111 of the Copyright Act provides “cable systems” (as defined by the Copyright Act) a statutory license to retransmit copyrighted broadcast performances if the “cable system” pays a statutory fee for those performances. Some content creators and owners contend that the Commission, in interpreting the definition of MVPD in the Communications Act, should be cognizant of the interplay between Section 111 of the Copyright Act and the Communications Act and even suggest that a Commission decision interpreting the definition of MVPD to include Internet-based distributors would conflict with copyright law. But the market and legal landscape has changed significantly since content creators and owners made those claims. Therefore, we ask commenters to update the record with respect to how expanding the definition of MVPD in the Communications Act to include some Internet-based distributors interrelates with copyright law.

Cable-Affiliated Content. Through application of the program access rules, Internet-based distributors that qualify as MVPDs will be entitled to non-discriminatory access to cable-affiliated networks. Generally speaking, a programmer licenses content from various content creators, aggregates the content into a network, and then licenses the network to MVPDs for distribution. Discovery claims, however, that cable-affiliated networks cannot license all of the content displayed on their networks for distribution on the Internet because they frequently do not possess the right to authorize Internet distribution of that content. Rather, Discovery argues that (i) content creators frequently retain for themselves the rights to Internet distribution in order to generate a separate revenue stream by displaying the content on their own websites or by selling the content to other video providers; and (ii) obtaining Internet distribution rights is

simply too expensive for some networks. What effect should the Copyright Office's decisions have on our statutory and policy analysis?

To what extent do cable-affiliated networks possess – or have the ability to negotiate for – the right to authorize distribution of content displayed on their network over the Internet? If we adopt the Linear Video Interpretation, what impact does that have on existing rights for content distribution? We note that some cable-affiliated networks are made available over the Internet to authenticated MVPD subscribers. Does this reflect that cable-affiliated programmers possess the right to authorize distribution of content displayed on their network over the Internet? Does the concern about lack of rights to authorize Internet distribution of content apply only with respect to content not owned by the network? To what extent do cable-affiliated networks own the content displayed on their networks (or are affiliated with the content creators or otherwise possesses all of the rights with respect to distribution of that content)? To what extent is the content displayed on cable-affiliated networks owned by entities unaffiliated with the network?

Would or should the adoption of the proposed definition of an MVPD have any effect on a cable-affiliated network that does not possess the right to authorize Internet distribution of content displayed on its network? In other words, would or should the network be required to obtain such rights to comply with the program access rules if certain Internet-based distributors qualify as MVPDs? We seek comment on how the resolution of this question would impact content creators, cable-affiliated programmers, and MVPDs, either traditional or Internet-based. We also seek comment on our authority to require entities to enter into contracts for these distribution rights.

Non-Broadcast, Non-Cable-Affiliated Content. If we were to require cable-affiliated networks to obtain Internet distribution rights from content creators to comply with the program access rules, what impact, if any, would or should this have on non-cable-affiliated networks? For example, Ovation claims that, if cable-affiliated networks are required to obtain Internet

distribution rights, “marketplace pressures would foreseeably require other networks to do the same.” We seek comment on this concern.

Regulatory Treatment of Cable Operators and DBS Providers that Provide Linear Video Services via IP. It seems evident that merely using IP to deliver cable service does not alter the classification of a facility as a cable system or of an entity as a cable operator. That is, to the extent an operator may provide video programming services over its own facilities using IP delivery within its footprint it remains subject to regulation as a cable operator. At the same time, we understand that some cable operators and DBS providers are exploring new business models that might be indistinguishable from other over-the-top (“OTT”) services—that is, linear video services that travel over the public Internet and that cable operators do not treat as managed video services on any cable system. As mentioned above, cable operators and DBS providers are obtaining rights for online distribution of content, and some have launched or may soon launch Internet-based video programming services. Below, we seek comment on the regulatory treatment of national OTT video services that a cable operator or DBS provider may provide nationally—as contrasted to the traditional services it offers.

Cable Service Provided via IP Over the Operator’s Facilities. The Act defines a cable operator as, essentially, an entity that provides cable service over a cable system. Thus, we must interpret the three terms – cable service, cable system, and cable operator – together to determine the proper regulatory treatment of IP-based services provided by cable operators. The Act defines cable service as “(A) the one-way transmission to subscribers of (i) video programming, or (ii) other programming service, and (B) subscriber interaction, if any, which is required for the selection or use of such video programming or other programming service.” The Commission and other authorities have previously concluded that the statute’s definition of “cable service” includes linear IP video service.

Second, to the extent a cable operator uses “a set of closed transmission paths” to provide cable service, as one providing IP video programming over its copper wire (including coaxial cable) or fiber optic cable does, its facility meets Section 602(7) of the Act’s definition of cable system: “a facility, consisting of a set of closed transmission paths and associated signal generation, reception, and control equipment that is designed to provide cable service which includes video programming and which is provided to multiple subscribers within a community, but such term does not include (A) a facility that serves only to retransmit the television signals of 1 or more television broadcast stations; (B) a facility that serves subscribers without using any public right-of-way; (C) a facility of a common carrier which is subject, in whole or in part, to the provisions of subchapter II of this chapter, except that such facility shall be considered a cable system (other than for purposes of section 541(c) of this title) to the extent such facility is used in the transmission of video programming directly to subscribers, unless the extent of such use is solely to provide interactive on-demand services; (D) an open video system that complies with section 573 of this title; or (E) any facilities of any electric utility used solely for operating its electric utility system.”

Finally, an entity that delivers cable services via IP is a cable operator to the extent it delivers those services as managed video services over its own facilities and within its footprint. This is compelled by the Act’s definition of a cable operator as a “person or group of persons (A) who provides cable service over a cable system and directly or through one or more affiliates owns a significant interest in such cable system, or (B) who otherwise controls or is responsible for, through any arrangement, the management and operation of such a cable system.”

IP-based service provided by a cable operator over its facilities and within its footprint must be regulated as a cable service not only because it is compelled by the statutory definitions; it is also good policy, as it ensures that cable operators will continue to be subject to the pro-

competitive, consumer-focused regulations that apply to cable even if they provide their services via IP.

Congress and the Commission advanced several pro-competitive, consumer-focused values when they adopted the cable-specific provisions of the Act and the rules implementing these important provisions. The Act and our rules include many cable-specific requirements, including the following: annual regulatory fees; Emergency Alert System (“EAS”) requirements; the V-Chip; commercial limits in children’s programs; network non-duplication; syndicated program exclusivity; notice to broadcasters regarding: (i) deletion or repositioning of a broadcast signal, (ii) a change in designation of principal headend, (iii) change in technical configuration, (iv) the provision of service to 1000 subscribers, thereby entitling broadcast stations to exercise non-duplication protection or syndicated exclusivity protection; political programming and candidate access rules; sponsorship identification; lotteries; public inspection file; public, educational, or governmental channels (“PEG”); program access; leased access; various reporting requirements; cross-ownership restrictions; prohibition on buy outs; national subscriber limits (horizontal ownership restriction); limits on carriage of vertically integrated programming; various franchising requirements; rate regulation, including a requirement to offer a basic service tier, a prohibition on negative option billing, an obligation to offer a tier buy-through option, and requirements pertaining to information on subscriber bills; regulation of services, facilities, and equipment, including minimum technical standards and notification to customers of changes in rates, programming services, or channel positions; consumer protection and customer service; consumer electronics equipment compatibility, including prohibition on scrambling or encrypting the basic service tier; support for unidirectional digital cable products (Plug and Play); protection of subscriber privacy; transmission of obscene programming; and scrambling of cable channels for non-subscribers.

In particular, these obligations on cable operators are critical for noncommercial, local, and independent broadcasters. Sections 614 and 615 of the Communications Act and implementing rules adopted by the Commission entitle commercial and noncommercial television broadcasters to carriage on local cable television systems. When the Commission proposed implementing regulations, it noted that Congress emphasized strongly that the public interest demands that cable subscribers be able to access their local commercial and noncommercial broadcast stations. That congressional policy directive persists today; and the continued application of these requirements to cable operators that provide video programming over IP will ensure that local broadcasters will be carried, and that other cable-centric regulations will apply, regardless of the method that the cable operator uses to deliver the cable service.

Cable Operators Offering OTT Services. We tentatively conclude that video programming services that a cable operator may offer over the Internet should not be regulated as cable services. Some cable operators have announced plans to offer video programming services via the Internet. If a cable operator delivers video programming service over the Internet, rather than as a managed video service over its own facilities, we tentatively conclude that this entity would be (i) a cable operator with respect to its managed video service, and (ii) a non-cable MVPD under our proposed Linear Programming Interpretation with respect to its OTT service. To the extent a consumer located within a cable operator's footprint may access the cable operator's OTT service using that cable operator's broadband facilities for Internet access, how should this arrangement be classified? We tentatively conclude that such an OTT service, if provided to consumers without regard to whether they subscribe to the cable operator's managed video service, would be a non-cable MVPD service inside and outside of the operator's footprint, even if it is accessible over that cable operator's broadband facilities. We seek comment on whether there is any reason that our tentative conclusion should change if a cable operator provides an OTT service within its footprint only, rather than nationally. Would our analysis

change if the OTT service were bundled with the cable service? Finally, we seek comment on the likely forms that new OTT services will take, and on both the application of the statutory definitions discussed above to such services and the policy implications of classifying these services.

DBS Providers Offering OTT Services. Some DBS providers offer linear OTT services (and have announced plans to expand those services) via the Internet. To the extent that DBS providers offer video programming services over the Internet, we tentatively conclude that those services should not be regulated as DBS service, and therefore should not be subject to the regulatory and statutory obligations and privileges of such services. If we adopt our proposed Linear Programming Interpretation, those services would be MVPD services subject to the regulatory and statutory obligations and privileges of such services. We reach this tentative conclusion because that service does not use the providers' satellite facilities, but rather relies on the Internet for delivery. We believe that this tentative conclusion is consistent with the Act and our rules. We seek comment on this tentative conclusion.

Authority. The Notice of Proposed Rulemaking is issued pursuant to authority contained in sections 4(i), 4(j), 303(r), 325, 403, 616, 628, 629, 634 and 713 of the Communications Act of 1934, as amended, 47 U.S.C. 154(i), 154(j), 303(r), 325, 403, 536, 548, 549, 554, and 613.

Ex Parte Rules. The proceeding initiated by the Notice of Proposed Rulemaking shall be treated as "permit-but-disclose" proceedings in accordance with the Commission's ex parte rules.¹ Persons making ex parte presentations must file a copy of any written presentation or a memorandum summarizing any oral presentation within two business days after the presentation (unless a different deadline applicable to the Sunshine period applies). Persons making oral ex parte presentations are reminded that memoranda summarizing the presentation must: (1) list all persons attending or otherwise participating in the meeting at which the ex parte presentation

¹ 47 CFR 1.1200 – 1.1216.

was made; and (2) summarize all data presented and arguments made during the presentation. If the presentation consisted in whole or in part of the presentation of data or arguments already reflected in the presenter's written comments, memoranda, or other filings in the proceeding, the presenter may provide citations to such data or arguments in his or her prior comments, memoranda, or other filings (specifying the relevant page and/or paragraph numbers where such data or arguments can be found) in lieu of summarizing them in the memorandum. Documents shown or given to Commission staff during *ex parte* meetings are deemed to be written *ex parte* presentations and must be filed consistent with rule 1.1206(b). In proceedings governed by rule 1.49(f) or for which the Commission has made available a method of electronic filing, written *ex parte* presentations and memoranda summarizing oral *ex parte* presentations, and all attachments thereto, must be filed through the electronic comment filing system available for that proceeding, and must be filed in their native format (e.g., .doc, .xml, .ppt, searchable .pdf). Participants in this proceeding should familiarize themselves with the Commission's *ex parte* rules.

Filing Requirements. Pursuant to §§ 1.415 and 1.419 of the Commission's rules,² interested parties may file comments and reply comments on or before the dates indicated on the first page of this document. Comments may be filed using the Commission's Electronic Comment Filing System ("ECFS"). Electronic Filers: Comments may be filed electronically using the Internet by accessing the ECFS: <http://fjallfoss.fcc.gov/ecfs2/>. Paper Filers: Parties who choose to file by paper must file an original and one copy of each filing. If more than one docket or rulemaking number appears in the caption of this proceeding, filers must submit two additional copies for each additional docket or rulemaking number. Filings can be sent by hand or messenger delivery, by commercial overnight courier, or by first-class or overnight U.S. Postal Service mail. All filings must be addressed to the Commission's Secretary, Office of the Secretary, Federal Communications Commission. All hand-delivered or messenger-delivered

² See *id.* §§ 1.415, 1.419.

paper filings for the Commission's Secretary must be delivered to FCC Headquarters at 445 12th St., SW, Room TW-A325, Washington, DC 20554. The filing hours are 8:00 a.m. to 7:00 p.m. All hand deliveries must be held together with rubber bands or fasteners. Any envelopes and boxes must be disposed of before entering the building. Commercial overnight mail (other than U.S. Postal Service Express Mail and Priority Mail) must be sent to 9300 East Hampton Drive, Capitol Heights, MD 20743. U.S. Postal Service first-class, Express, and Priority mail must be addressed to 445 12th Street, SW, Washington DC 20554.

Availability of Documents. Comments and reply comments will be available for public inspection during regular business hours in the FCC Reference Center, Federal Communications Commission, 445 12th Street, S.W., CY-A257, Washington, D.C., 20554. These documents will also be available via ECFS. Documents will be available electronically in ASCII, Microsoft Word, and/or Adobe Acrobat.

People with Disabilities. To request materials in accessible formats for people with disabilities (braille, large print, electronic files, audio format), send an e-mail to fcc504@fcc.gov or call the FCC's Consumer and Governmental Affairs Bureau at (202) 418-0530 (voice), (202) 418-0432 (TTY).

Regulatory Flexibility Analysis. As required by the Regulatory Flexibility Act of 1980, see 5 U.S.C. 604, the Commission has prepared an Initial Regulatory Flexibility Analysis (IRFA) of the possible significant economic impact on small entities of the policies and rules addressed in this document. The IRFA is set forth in Appendix B. Written public comments are requested in the IRFA. These comments must be filed in accordance with the same filing deadlines as comments filed in response to this Notice of Proposed Rulemaking as set forth on the first page of this document, and have a separate and distinct heading designating them as responses to the IRFA.

Initial Paperwork Reduction Act Analysis. This Notice of Proposed Rulemaking seeks comment on a potential new or revised information collection requirement. If the Commission adopts any new or revised information collection requirement, the Commission will publish a separate notice in the Federal Register inviting the public to comment on the requirement, as required by the Paperwork Reduction Act of 1995, Public Law 104-13 (44 U.S.C. 3501-3520). In addition, pursuant to the Small Business Paperwork Relief Act of 2002, Public Law 107-198, 44 U.S.C. 3506(c)(4), the Commission seeks specific comment on how it might “further reduce the information collection burden for small business concerns with fewer than 25 employees.”

III. ORDERING CLAUSES

Accordingly, IT IS ORDERED, pursuant to the authority contained in sections 4(i), 4(j), 303(r), 325, 403, 616, 628, 629, 634 and 713 of the Communications Act of 1934, as amended, 47 U.S.C. 154(i), 154(j), 303(r), 325, 403, 536, 548, 549, 554, and 613, that the Notice of Proposed Rulemaking IS ADOPTED.

IT IS FURTHER ORDERED that the Commission's Consumer and Governmental Affairs Bureau, Reference Information Center, SHALL SEND a copy of the Notice of Proposed Rulemaking including the Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the Small Business Administration.

List of Subjects in 47 CFR Part 76

Administrative practice and procedure, Cable television, Equal employment opportunity, Political candidates, Reporting and recordkeeping requirements

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch,
Secretary.

For the reasons discussed in the preamble, the Federal Communications Commission proposes to amend 47 CFR part 76 as follows:

PART 76 – MULTICHANNEL VIDEO AND CABLE TELEVISION SERVICE

1. The authority citation for part 76 continues to read as follows:

Authority: 47 U.S.C. 151, 152, 153, 154, 301, 302, 302a, 303, 303a, 307, 308, 309, 312, 315, 317, 325, 339, 340, 341, 503, 521, 522, 531, 532, 534, 535, 536, 537, 543, 544, 544a, 545, 548, 549, 552, 554, 556, 558, 560, 561, 571, 572, 573.

2. Section 76.5 is amended by revising paragraphs (rr) and (ss) to read as follows:

§ 76.5 Definitions.

* * * * *

(rr) Linear Video. A stream of video programming that is prescheduled by the programmer.

(ss) Multichannel Video Programming Distributor. A person such as, but not limited to, a cable operator, a multichannel multipoint distribution service, a direct broadcast satellite service, or a television receive-only satellite program distributor, who makes available for purchase, by subscribers or customers, multiple channels of video programming. As used in this paragraph, channel means linear video without regard to the means by which the programming is distributed.

§ 76.64 [Amended].

3. Section 76.64 is amended by removing and reserving paragraph (d).

4. Section 76.71 is amended by revising paragraph (a) to read as follows:

§ 76.71 Scope of application.

(a) The provisions of this subpart shall apply to any corporation, partnership, association, joint-stock company, or trust engaged primarily in the management or operation of any cable system. Cable entities subject to these provisions include those systems defined in § 76.5(a), all satellite master antenna television systems serving 50 or more subscribers, and any multichannel video

programming distributor. -Multichannel video programming distributors do not include any entity which lacks control over the video programming distributed. For purposes of this subpart, an entity has control over the video programming it distributes, if it selects video programming channels or programs and determines how they are presented for sale to consumers.

Notwithstanding the foregoing, the regulations in this subpart are not applicable to the owners or originators (of programs or channels of programming) that distribute six or fewer channels of commonly-owned video programming over a leased transport facility. For purposes of this subpart, programming services are “commonly-owned” if the same entity holds a majority of the stock (or is a general partner) of each program service.

* * * * *

§ 76.905 [Amended].

5. Section 76.905 is amended by removing and reserving paragraph (d).

6. Section 76.1000 is amended by revising paragraph (e) to read as follows:

§ 76.1000 Definitions.

* * * * *

(e) Multichannel video programming distributor. The term “multichannel video programming distributor” means an entity that falls under the definition provided in § 76.5(rr) as well as buying groups or agents of all such entities.

NOTE TO PARAGRAPH (e): A video programming provider that provides more than one channel of video programming on an open video system is a multichannel video programming distributor for purposes of this subpart O and § 76.1507.

* * * * *

§ 76.1200 [Amended].

7. Section 76.1200 is amended by removing and reserving paragraph (b).

8. Section 76.1300 is amended by revising paragraph (d) to read as follows:

§ 76.1300 Definitions.

* * * * *

(d) Multichannel video programming distributor. The term “multichannel video programming distributor” means an entity that falls under the definition provided in § 76.5(rr) as well as buying groups or agents of all such entities.

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